

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 4:05-CV-329-GKF-PJC</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S RESPONSE IN SUPPORT OF CHEROKEE NATION'S  
MOTION TO INTERVENE [DKT #2564]**

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii
I. INTRODUCTION AND BACKGROUND .....	1
II. ARGUMENT .....	3
A. Legal Standard .....	3
B. Based Upon the Findings in the Court’s July 22, 2009 Order, the Cherokee Nation Is Entitled To Intervene as of Right .....	4
1. <i>Rule 24(a)(2)’s Factor (1): “Claims an interest             relating to the property or transaction that is the             subject of the action”</i> .....	5
2. <i>Rule 24(a)(2)’s Factor (2): “Is so situated that             disposing of the action may as a practical matter             impair or impede the movant’s ability to protect its             interest”</i> .....	7
3. <i>Rule 24(a)(2)’s Factor (3): “Unless existing parties             adequately represent that interest”</i> .....	8
4. <i>Any Argument by Defendants That the Cherokee Nation             Does Not Satisfy the Substantive Factors Under Rule             24(a)(2) Should Be Given No Weight</i> .....	8
C. The Cherokee Nation’s Motion To Intervene Is Timely .....	9
1. <i>The Cherokee Nation Sought To Intervene in             This Action Promptly Upon Learning of the Court’s View             That Its Interests in Protecting Water Quality in the IRW             Were Not Being Adequately Protected by             the State</i> .....	10
2. <i>Any Prejudice To the Existing Parties Is Minimal             Compared To the Importance of the Issues Raised by the             Nation’s Proposed Intervention</i> .....	16
a. The State .....	17

b.	Defendants .....	18
3.	<i>The Cherokee Nation Will Be Substantially Prejudiced If Intervention Is Denied</i> .....	20
4.	<i>The Existence of Unusual Circumstances Also Warrants the Nation's Intervention</i> .....	20
III.	CONCLUSION.....	22

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <b><u>Cases</u></b>	
<i>Barnett v. U.S. Dept. of Interior</i> , 317 F.3d 783 (8th Cir. 2003) .....	3
<i>Citizen Potawatomi Nation v. Norton</i> , 248 F.3d 993 (10th Cir. 2001) .....	6
<i>Cram v. McMullen</i> , 1988 U.S. Dist. LEXIS 9947 (D. Kan. Aug. 31, 1998) .....	10
<i>Elliott Industries Limited Partnership v. BP America Prod. Co.</i> , 407 F.3d 1091 (10th Cir. 2005) .....	11, 16, 18
<i>Johnson v. City of Tulsa, 94-CV-39-H(M)</i> , Dkt. #608 (N.D. Okla. Sept. 10, 2002) .....	9, 10, 18
<i>Legal Aid Soc. of Alameda Co. v. Dunlop</i> , 618 F.2d 48 (9th Cir. 1980) .....	10
<i>McDonald v. E.J. Lavino Co.</i> , 430 F.2d 1065 (5th Cir. 1970) .....	9, 19
<i>New Mexico ex rel. Richardson v. Bureau of Land Management</i> , 565 F.3d 683 (10th Cir. 2009) .....	3
<i>Reich v. ABC/York-Estes Corp.</i> , 64 F.3d 316 (7th Cir. 1995) .....	10
<i>Richardson v. Bureau of Land Management</i> , 565 F.3d 683 (10th Cir. 2009) .....	3
<i>San Juan County v. United States</i> , 503 F.3d 1163 (10th Cir. 2007) .....	3, 5
<i>Sanguine, Ltd. v. DOI</i> , 736 F.2d 1416 (10th Cir. 1984) .....	10
<i>Sierra Club v. Espy</i> , 18 F.3d 1202 (5th Cir. 1994) .....	10

<i>South Dakota ex rel. Barnett v. U.S. Dept. of Interior</i> , 317 F.3d 783 (8th Cir. 2003) .....	3
<i>United Airlines, Inc. v. McDonald</i> , 432 U.S. 385 (1977).....	11
<i>United Keetoowah Band v. United States</i> , 480 F.3d 1318 (Fed. Cir. 2007).....	5, 9
<i>United States v. Asarco</i> , 471 F. Supp. 2d 1063 (D. Idaho 2005) .....	13
<i>Utah Ass’n of Counties v. Clinton</i> , 255 F.3d 1246 (10th Cir. 2001) .....	passim
<i>WildEarth Guardians v. United States Forest Serv.</i> , 573 F.3d 992 (10th Cir. 2009) .....	3, 5, 7

#### **Statutes & Administrative Codes**

42 U.S.C. § 9607(f)(1) .....	14
Cherokee Nation Code § 302(B)(9) .....	6

#### **Rules & Other Authorities**

Fed. R. Civ. P. 24(a) .....	passim
7C Wright & Miller, Federal Practice and Procedure § 1916.....	9

Plaintiff, the State of Oklahoma (“the State”), hereby submits this response in support of the Cherokee Nation’s Motion to Intervene (Dkt. #2564).

## **I. INTRODUCTION AND BACKGROUND**

The State filed its original Complaint in this matter on June 13, 2005. On September 19, 2005, Defendants held a joint defense meeting where the agenda included discussion of the Cherokee Nation as a potential intervenor. Ex. D (Ginn009953). In October 2005, Defendants filed a series of Rule 12(b) motions to dismiss. Not one of those motions to dismiss, however, made any mention of the Cherokee Nation.

On October 31, 2008 — over three years after this case began — Defendants filed their Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party (“Rule 19 Motion”). Dkt. #1788. As part of that Motion, Defendants argued that “[g]iven the nature of the claims being pursued by the State in this action and the well-established interest of the Cherokee Nation in the natural resources of the IRW, the Cherokee Nation is clearly a required party . . . .” *Id.* at 15. The State opposed that motion.

Indeed, the State and Cherokee Nation submitted an Agreement to the Court — executed by the Attorney General of Oklahoma and the Attorney General of the Cherokee Nation — which provides in pertinent part that “the Nation agrees that the continued prosecution of this action by the State of Oklahoma would not impair or impede the Nation’s interests such that it is a necessary party under Rule 19(a).” *See* Dkt. #2108-2. Clearly, the Cherokee Nation was satisfied that the State could adequately represent its interests in the Nation’s absence.

Nonetheless, on July 22, 2009, the Court granted Defendants’ Rule 19 Motion and dismissed the State’s substantial common law and CERCLA damage claims in their entirety.

Dkt. #2362. In granting the Rule 19 Motion, the Court found that: “The claimed interests of the Cherokee Nation in the water rights portion of the subject matter of this action are substantial and are neither fabricated nor frivolous”; and it was “unpersuaded that the State can adequately protect the absent tribe’s interest.” *Id.* at 10 & 14. Ultimately, the Court concluded that “[a]djudication of this action in the Cherokee Nation’s absence would impair or impede the Nation’s sovereign and stated interest in recovering for itself civil remedies for pollution to lands, waters and other natural resources within its tribal jurisdiction.” *Id.* at 13.

The State filed a Motion to Reconsider the July 22 Order, which the Court denied on August 18, 2009.<sup>1</sup>

The Cherokee Nation promptly filed its Motion to Intervene, just two weeks later, on September 2, 2009. Dkt. #2564. In the Motion to Intervene, the Nation pertinently asserts that: (1) “The Nation’s interest in this litigation has been recognized by all parties, and this Court”; (2) “unless the [] Nation is allowed to intervene, there will not be a complete remedy for the pollution of the IRW in this case”; and (3) “[b]y finding that the Nation was an indispensable party, this Court put the Nation on notice that it was a proper party to this litigation.” *Id.* at 2, 3 & 5.

As set forth below, “[f]ederal courts should allow intervention where no one would get hurt and greater justice could be attained.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001). Here, no one will be hurt by allowing the Nation’s intervention and greater justice can *only* be attained if the Nation is allowed to intervene.

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<sup>1</sup> The State maintains its view that the July 22, 2009 order (Dkt. #2362) was wrongly decided, and the State reserves its rights to appeal from that decision in all respects. Nevertheless, the State submits this Response to the Cherokee Nation’s Motion to Intervene based on the current posture of the case.

Having found that the Nation is a required party whose interests will be impeded in its absence, the Court has essentially concluded that the Nation is a proper intervenor of right. Furthermore, the Motion to Intervene is timely. Until very recently, when the Court ruled otherwise, the Nation had no reason to believe its interests in protecting water quality in the IRW were not being properly represented by the State in this action. Upon learning of the Court's contrary opinion, the Nation acted quickly to intervene. Defendants can make no credible claim of prejudice resulting from the intervention. On the other hand, if the Nation is not permitted to intervene, the Nation and State will be greatly prejudiced and may never obtain the full remedy they seek. It is time for these Defendants to be fully held to account for the immense damage they have caused to the Illinois River Watershed.

The Motion to Intervene should be granted.

## II. ARGUMENT

### A. Legal Standard

The Cherokee Nation seeks to intervene as of right pursuant to Fed. R. Civ. P. 24(a) ("Rule 24(a)"). Rule 24(a) provides:

**Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).<sup>2</sup> "The central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention." *San Juan County v. United*

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<sup>2</sup> The Tenth Circuit's review of a denial of a motion to intervene as of right is *de novo*. See *WildEarth Guardians v. United States Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009).

*States*, 503 F.3d 1163, 1193, 1199 (10th Cir. 2007). “Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.” *South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); accord *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 695 n.12 (10th Cir. 2009) (“We generally follow[] a liberal view in allowing intervention under Rule 24(a).” (internal quotation marks omitted)).

As discussed below, the Cherokee Nation satisfies the substantive and procedural requirements of Rule 24(a)(2), which then mandates the grant of intervention. To wit: The Nation has already been found by this Court (in the context of its Rule 19 counterpart) to satisfy the substantive requirements set forth in Rule 24(a)(2) and has filed a timely motion. Therefore, the Nation’s Motion to Intervene should be granted.

**B. Based Upon the Findings in the Court’s July 22, 2009 Order, the Cherokee Nation Is Entitled To Intervene as of Right**

Rule 24 provides that “the court *must* permit anyone to intervene who [1] claims an interest relating to the property or transaction that is the subject of the action, and [2] is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, [3] unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

The language of these three factors in Rule 24 governing intervention as of right nearly mirror those set forth in Rule 19 governing the question of whether Rule 19 requires joinder of parties. Rule 19(a)(1) provides that a person is “required” if:

- (A) in that person’s absence, the court cannot accord complete relief among existing parties; or
- (B) that person *claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may:*
  - (i) *as a practical matter impair or impede the person’s ability to protect the interest;* or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1) (emphases added). Thus, the language of Rule 19(a)(1)(B) and Rule 24(a)(2) is nearly identical. Indeed, “[t]he Rules Advisory Committee to the Fed. R. Civ. P. comments that Rule 24(a)(2) was drafted to be a ‘counterpart’ to Rule 19(a)(2) and that an applicant is entitled to intervene in an action when his interest is comparable to that of a person under Rule 19(a)(2).” *United Keetoowah Band v. United States*, 480 F.3d 1318, 1324 n.4 (Fed. Cir. 2007); *see also id.* at 1324 n.3.

Here, the Court has already applied — in the context of a Rule 19 inquiry — the factors in Rule 24(a)(2), finding that they were satisfied and required the Cherokee Nation’s joinder. Dkt. #2362, July 22, 2009 Order. The same analysis results in a conclusion that the Nation be granted leave to intervene.

**1. Rule 24(a)(2)’s Factor (1): “Claims an interest relating to the property or transaction that is the subject of the action”**

The first substantive consideration that requires a court to grant intervention is whether the movant “claims an interest relating to the property or transaction that is the subject of the action.” Fed. R. Civ. P. 24(a)(2). With regard to this factor, the Tenth Circuit has stated: “To satisfy the impairment element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. *This burden is minimal.*” *WildEarth Guardians*, 573 F.3d at 995 (emphasis added; internal quotation marks omitted). “If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.” *San Juan County*, 503 F.3d at 1195 (internal quotation marks omitted). This element is fully satisfied in this case.

First, the Nation now comes before the Court, seeking intervention as of right based on its “claim[] [to] an interest in the waters of the IRW that are the subject of the action currently before the Court.” Dkt. #2564 at 3, Motion to Intervene; *see also id.* at 2-4.

Second, this Court has already found that the Nation satisfies this factor. In its July 22, 2009 Order, the Court stated, in the context of a Rule 19(a)(1) analysis, that “the court must determine whether the Cherokee Nation *claims* an interest relating to the subject of the action . . . .”<sup>3</sup> Dkt. #2362, July 22, 2009 Order at 7 (emphasis added). The Court concluded that “the Cherokee Nation claims an interest relating to the subject of this action for Rule 19 purposes.” *Id.* at 13; *see also id.* at 10 (“The claimed interests of the Cherokee Nation in the water rights portion of the subject matter of this action are substantial and are neither fabricated nor frivolous.”).

In support of its conclusion, the Court cited: (1) the Agreement between the State of Oklahoma and the Cherokee Nation (*id.* at 8); (2) the Cherokee Nation’s Environmental Quality Code, in which it “claims . . . an interest in protecting the Illinois River and in vindicating its claimed rights for any pollution of the watershed” (*id.* at 9); (3) the fact that “the Cherokee Nation claims an interest in recovering for itself civil remedies — including monetary damages — for the injuries to the IRW claimed in this action” (*id.* (citing the Cherokee Nation’s Environmental Quality Code)); (4) the Cherokee Nation’s claim to have an interest in “provid[ing] for regulation and taxation of interests, actions and omissions that adversely affect the environment of the Cherokee Nation” (*id.* at 10 (quoting 63 Cherokee Nation Code

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<sup>3</sup> Akin to Rule 24(a)(2), “Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party *claims an interest* relating to the subject of the action.” Dkt. #2362, July 22, 2009 Order at 8 (quoting *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998, *modified on reh’g*, 257 F.3d 1158 (10th Cir. 2001)).

§ 302(B)(9)); and (5) the Cherokee Nation's claim to "water rights in the Illinois River established under federal laws and treaties which are unaffected by statehood" (*id.* at 10).

In sum, this Court has already concluded that the Nation satisfies the first factor of Rule 24(a)(2) requiring intervention, namely, that it "claims an interest relating to the property or transaction that is the subject of the action."

**2. Rule 24(a)(2)'s Factor (2): "Is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"**

The second factor under Rule 24(a)(2) requiring intervention is that the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). This Court has already found, in the context of its Rule 19 analysis, that the Nation's interests satisfy this factor. Specifically, the Court held: "Adjudication of this action in the Cherokee Nation's absence would impair or impede the Nation's sovereign and stated interest in recovering for itself civil remedies for pollution to lands, waters and other natural resources within its tribal jurisdiction." Dkt. #2362, July 22, 2009 Order at 13. Based on the Court's finding, the Nation has satisfied the second factor of Rule 24(a)(2) supporting its right to intervene.<sup>4</sup>

Any argument that the Nation is not prejudiced because the claims that affect the Nation's interests have been dismissed should not be credited. Such an argument ignores the fact that this Court has ruled that the presence of *both* sovereigns is necessary for the damages claims to proceed. Thus, viewed from the proper perspective, the Nation is being prejudiced by not being able to proceed in the same action as the State. Because of the State's sovereignty, proceeding individually without the State is simply not an option.

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<sup>4</sup> Any claim to the contrary by Defendants at this juncture contradicts their earlier position. Defendants should not be permitted to use their purported fear of multiple litigation as a sword in the context of Rule 19, and then invite multiple litigation as a shield in the context of Rule 24.

**3. Rule 24(a)(2)'s Factor (3): "Unless existing parties adequately represent that interest"**

The remaining consideration for intervention is whether the Nation's interest will be adequately represented by the existing parties to the litigation. The Tenth Circuit has recently confirmed that "the burden to satisfy this condition is minimal, and that the possibility of divergence of interest need not be great in order to satisfy the burden of the applicants. . . . An intervenor need only show the *possibility* of inadequate representation." *WildEarth Guardians*, 573 F.3d at 996 (citations and internal quotation marks omitted; emphasis in original). Like the other considerations, this Court has already found that the Nation's interests satisfy this factor as well. In its July 22 Order, the Court stated: "[T]his court is unpersuaded that the State can adequately protect the absent tribe's interest." Dkt. #2362 at 14. Thus, this consideration also supports the Nation's Motion to Intervene as of right.

**4. Any Argument by Defendants That the Cherokee Nation Does Not Satisfy the Substantive Factors Under Rule 24(a)(2) Should Be Given No Weight**

Any argument by Defendants suggesting that the Cherokee Nation does not satisfy Rule 24(a)(2)'s substantive requirements should be given no weight. In the context of Rule 19, Defendants vigorously argued that the factors governing joinder (i.e., the same factors governing intervention as of right under Rule 24(a)(2)) were satisfied. Specifically, Defendants argued: "Because the Cherokees possess a legally protected interest in the IRW's lands, waters, and other natural resources, resolution of this lawsuit without the Cherokee Nation will plainly 'impair or impede' the Nation's rights within the watershed." Dkt. #1788 at 15, Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation. In short, any argument by Defendants to the contrary — now that opposing such factors would suit their interest — should not be considered; they should be held to the same position as to these factors in both the Rule 19 and 24 contexts.

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Based on the foregoing, the Cherokee Nation readily satisfies the substantive requirements of Rule 24(a)(2) enumerated above.

**C. The Cherokee Nation's Motion To Intervene Is Timely**

In deciding any motion to intervene, a court must also consider the timeliness of the motion. Fed. R. Civ. P. 24(a). “The timeliness of a motion to intervene is assessed in light of *all the circumstances*. . . .” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (emphasis added; internal quotation marks omitted). Specifically, there are four factors to be considered in determining whether a motion to intervene is timely: (1) the length of time since the applicant knew or reasonably should have known of its interest in the case; (2) any prejudice to the existing parties; (3) any prejudice to the applicant; and (4) the existence of any unusual circumstances. *Id.* As the Fifth Circuit has reasoned:

‘Timeliness’ is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.

*McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970).

Also, the timeliness test is not intended as a means of punishment for a tardy intervenor; rather, it is a “guard against prejudicing the original parties by the failure to apply sooner.” *Utah Ass’n of Counties*, 255 F.3d at 1250. The timeliness analysis is “contextual,” and absolute measures of timeliness should be ignored. *Id.* In discussing the timeliness of a motion to intervene, the Tenth Circuit has stated that “[f]ederal courts should allow intervention where no one would get hurt and greater justice could be attained.” *Id.*

Further, “with respect to timeliness, a motion to intervene as of right should be treated more leniently than a motion for permissive intervention upon a finding that serious harm might

accrue to the movant if the motion were denied.” *Johnson v. City of Tulsa*, 94-CV-39-H(M), Dkt. #608 at 8 (N.D. Okla. Sept. 10, 2002) (attached as Exhibit A hereto) (citing 7C Wright & Miller, Federal Practice and Procedure § 1916 at 424). Here, the Cherokee Nation is entitled to intervene and is undeniably an intervenor of right as this Court has already determined that the Nation is a necessary party under Rule 19(a). Dkt. #2362; *see United Keetoowah*, 480 F.3d at 1324 n.3.

Under these principles, the Cherokee Nation’s Motion to Intervene is plainly timely.

**1. *The Cherokee Nation Sought To Intervene in This Action Promptly Upon Learning of the Court’s View That Its Interests in Protecting Water Quality in the IRW Were Not Being Adequately Protected by the State***

The first intervention principle identified by the Tenth Circuit in *Utah Association of Counties*, 255 F.3d at 1250, concerns a timeliness principle measured by the length of time since the applicant knew or reasonably should have known of its interest in the case. That time period is measured from when the movant “knew or should have known of its interest in the case and that its interest was not adequately represented by” the parties. Ex. A, *Johnson v. City of Tulsa*, at 8 (citing *Sanguine, Ltd. v. DOI*, 736 F.2d 1416, 1418 (10th Cir. 1984)).

Thus, it is well-established that the timeliness clock does not begin to run on a would-be intervenor until he has reason to know that his interest is not being adequately represented by the existing parties to the litigation. *See, e.g., Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) (“A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties.”); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995) (“[W]e do not expect a party to petition for intervention in instances in which the potential intervenor has no reason to believe its interests are not being properly represented.”); *Legal Aid Soc. of Alameda Co. v. Dunlop*, 618

F.2d 48, 50 (9th Cir. 1980) (“[T]he relevant circumstance here for determining timeliness is when the intervenor became aware that its interest would no longer be protected adequately by the parties.”); *Cram v. McMullen*, 1988 U.S. Dist. LEXIS 9947, at \*4-\*5 (D. Kan. Aug. 31, 1998) (“Until North River had reason to question the validity of that contract . . . it had no basis for requesting intervention. . . . Because North River filed its application one month after discovering that the defendants’ insurance policy may be invalid, its application is timely.”). Indeed, the United States Supreme Court has found a motion to intervene to be timely in circumstances where “as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.” *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977).

The Tenth Circuit recently applied this timeliness principle in *Elliott Industries Limited Partnership v. BP America Production Co.*, 407 F.3d 1091 (10th Cir. 2005). In *Elliott Industries*, litigants in a state court action sought to intervene in a related federal appeal solely to challenge the existence of subject matter jurisdiction over a certified class of oil and gas royalty owners. The appellees in the federal case previously had contested the existence of federal subject matter jurisdiction, but, upon entry of final judgment, it was no longer in their interest to do so. The Tenth Circuit concluded that “[p]rior to the district court’s entry of final judgment it was reasonable for [the state court litigants] to rely on Appellees to argue the issue of subject matter jurisdiction.” *Id.* at 1103. Accordingly, the court found the motion to intervene to be timely, *even though it was filed post-judgment*.

Until very recently, the Nation had no reason to believe its interests in protecting water quality in the IRW were not being properly represented by the State in this action. In fact, as the

Court is well aware, the Nation attempted to assign to the State its claims against Defendants for pollution of the IRW via an Agreement dated May 19, 2009 to demonstrate that Defendants' Rule 19 motion was ill-conceived. *See* Dkt. #2108-2. Though later found by the Court to be non-binding, the May 19 Agreement executed by the Attorney General of the Cherokee Nation is clearly an expression of the Nation's view that the State could adequately represent its interests.

In this regard, the May 19 Agreement importantly provides:

- “[T]he State of Oklahoma and the Cherokee Nation agree that the lands, water and other natural resources of the Illinois River Watershed should be free of pollution, and accordingly that the claims asserted in [the case at bar] should continue to be prosecuted against Defendants. . . .”
- “[T]he State of Oklahoma and the Cherokee Nation agree that the State has sufficient interests in the lands, water and other natural resources located within the Illinois River Watershed to prosecute the claims asserted in [the case at bar]...”
- “[T]he Nation agrees that *the continued prosecution of this action by the State of Oklahoma would not impair or impede the Nation's interests* such that it is a necessary party under Rule 19(a)...”
- “[T]he State of Oklahoma and the Cherokee Nation agree that *it is not necessary for the Court to resolve the precise nature of each sovereign's interests in lands, water and other natural resources of the Illinois River Watershed* in order to determine that the State of Oklahoma has sufficient interests to prosecute the action in [the case at bar] and agree that it is in the best interests of both sovereigns to avoid unnecessary time and expense associated with such an exercise at the present time and in the present forum...”

Dkt. #2108-2 at 1 (emphases added).

Furthermore, it was eminently reasonable for the Nation to believe its interests in protecting the water quality of the IRW were adequately represented by the State until such time as this Court determined that the State could not adequately represent the Nation's interests. Nevertheless, contrary to the Nation's and the State's understanding, on July 22, 2009, the Court found that it was “unpersuaded that the State can adequately protect the absent tribe's interest.”

Dkt. #2362 at 14. The Nation explains its reliance on the State's ability to represent its interests in its Motion to Intervene:

It was not until July 22, 2009 when the Court's ruled on the Defendant's [sic] motion [to dismiss] that the Nation was aware that it was necessary for it to seek intervention. Further complicating issues, prior to the ruling it was not clear that the Nation needed to participate in this matter. By finding that the Nation was an indispensable party, this Court put the Nation on notice that it was proper party to this litigation.

Dkt. #2564 at 5.

Underscoring the reasonableness of the Nation's belief that its interests in protecting water quality of the IRW were adequately represented is the fact that the Court itself initially signaled that such reliance on the State was reasonable. During the July 2, 2009 hearing on Defendants' Rule 19 Motion, the Court acknowledged that "we still have CERCLA and *it's not necessary to determine the respective interests with regard to a CERCLA claim. And in fact, Coeur d'Alene says that.*" Ex. B (7/2/09 Hearing Tr. at 13) (emphasis added). Thus, as late as July 2, 2009, the Court was voicing its view (with which the State and Cherokee Nation agree) that the law does not require any allocation between the Nation's and State's respective interests. And the *Coeur d'Alene* decision referenced by the Court on July 2, 2009 (hereinafter "*Coeur d'Alene II*") expressly held that a CERCLA co-trustee may properly prosecute a CERCLA natural resource damage ("NRD") claim in the absence of the other co-trustee, consistent with CERCLA's language, purpose, and practice:

Under CERCLA the recovery, if any, *is not for the benefit of a given party, but goes to the trustee as the fiduciary to accomplish the stated goals.* At first blush, the complexity appeared to lie with the fact that more than one trustee could manage, control, or hold in trust a given natural resource and to avoid a double recovery the Court would have to determine the extent of each trustees' interest and apportion the damage accordingly. However, as pointed out by Plaintiffs' counsel, if the Court could truly do this there would be no need for the double recovery language in the statute because the situation would never arise.

The language of the statute dictates that *a co-trustee acting individually* or collectively with the other co-trustees *may go after the responsible party or parties for the full amount of the damage*, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party. *If there is a later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible party or parties.*

*United States v. Asarco*, 471 F. Supp. 2d 1063, 1068 (D. Idaho 2005) (“*Coeur d’Alene II*”)

(emphasis added). Thus, this decision and the Court’s comments during the July 2, 2009 hearing reinforce the reasonableness of the Nation’s reliance.

Additionally, the plain language of CERCLA itself makes it clear that *ownership of a natural resource is not a prerequisite for CERCLA trusteeship*. Section 107(f)(1) of CERCLA, which governs the existence of a state’s trusteeship interest in natural resources, provides that in addition to ownership being a basis for a CERCLA trusteeship interest, a CERCLA trusteeship interest also exists as to natural resources “*within the State*” or “*managed by*” or “*controlled by*” the State. *See* 42 U.S.C. § 9607(f)(1) (emphasis added). Regardless of which sovereign owns the resource, plainly, the waters of the IRW (and biota therein) at issue in this case are “within the State.” Likewise, there cannot be — and has never been — any dispute that the waters of the IRW and biota therein are “managed by” and “controlled by” the State.

For these reasons, the Nation (and the State) had a reasonable basis to be confident that the Court would deny Defendants’ Rule 19 Motion, determine that the Nation was not a required party, and permit the State to continue pursuing its damage claims in the Nation’s absence. However, on July 22, 2009, the Court did the opposite and granted Defendants’ Rule 19 Motion, determining that the Nation was a required party and dismissed the State’s damage claims. Dkt. #2362. Similarly, contrary to its statements at the July 2 hearing and the *Coeur d’Alene II* decision, the Court relied on the analysis in *Coeur d’Alene I* that was modified (and effectively

reversed) by *Coeur d'Alene II* — in determining that there would have to be an allocation between the Nation's and State's respective interests, “thereby impairing the Cherokee Nation's ability to protect its interests.” *Id.* at 14-15. This Court was the first court (other than the court in *Coeur d'Alene I*, which later reversed course) to have ruled in such a manner.

Thus, the Nation was reasonable in its belief that it was not necessary for it to intervene in this case to protect its interests up until the moment that the Court denied the State's Motion to Reconsider the July 22 Order on August 18, 2009. Based on the Court's statements concerning *Coeur d'Alene II* during the July 2 hearing and the plain language of CERCLA, it was reasonable to assume that the Court would reconsider and modify its July 22 Order with respect to CERCLA trusteeship. However, on August 18, 2009, the Court made it clear that it would not modify the July 22 Order. Ex. C (8/18/09 Hearing Tr. at 4-5).

The Nation filed its Motion to Intervene on September 2, 2009 (Dkt. #2564), just six weeks after the Court's July 22 Order and only 15 days after the Court denied the State's Motion to Reconsider. In sum, given the circumstances, the Nation acted promptly to intervene in this case upon learning of the Court's opinion that the State could not adequately represent the Nation's interests in protecting the water quality of the IRW. The Nation's Motion is timely.

Another circumstance in this case that supports a finding that the Nation's Motion to Intervene is timely is the fact that Defendants waited until October 31, 2008 to file their Rule 19 Motion (*see* Dkt. #1788) and the Court's finding that this Motion was timely.<sup>5</sup> A “Joint Defense

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<sup>5</sup> It is anticipated that Defendants will argue that the filing of their Rule 19 Motion was not tardy because the State had allegedly delayed in specifying in what injured natural resources the State claimed an interest. Such an argument lacks foundation. The State has from the outset of this case consistently asserted that it has an interest in “all waters running in definite streams.” *See* DKT #18 at ¶ 5 (First Amended Complaint, filed 8/19/05). If that was not sufficiently clear for Defendants, the State articulated these interests again in its response to Defendants' Rule 12(c) Motion regarding standing. *See* DKT #1111 (filed 3/30/07). Defendants thus clearly knew

Meeting” Agenda recently produced by the Cargill Defendants (involuntarily produced following the granting of a motion to compel) indicates that Defendants discussed the Cherokee Nation as being a “Potential Intervenor[.]” in this case as early as September 2005. Ex. D (Ginn009953); *see also* Dkt. #2599 (“In late 2005, counsel for the Tyson Defendants went to Tahlequah and met with Chief Smith and representatives of the Cherokee Nation *to discuss the fact that the State’s complaint directly implicated the Cherokee Nation’s asserted interests in lands, waters, and biota within the Oklahoma portion of the IRW.*” (emphasis added)). Yet, Defendants waited over *three years* to file their Rule 19 Motion. The Court did not rule on Defendants’ Rule 19 Motion until nearly nine months after the Motion was filed. As part of its July 22 Order, the Court found that Defendants’ Motion was timely filed. Dkt. #2362 at 21 (“The court finds defendants did not unduly delay filing their motion to dismiss.”). Of course, had Defendants not waited for three years to file their Rule 19 Motion (which resulted in the Court’s July 22, 2009 ruling almost nine months later and just two months prior to trial), the Nation would have had notice of the necessity to file its Motion to Intervene at a substantially earlier stage in the proceedings. Under these circumstances, basic principles of fairness and equity require a finding that the Nation’s Motion to Intervene is also timely.

**2. Any Prejudice To the Existing Parties Is Minimal Compared To the Importance of the Issues Raised by the Nation’s Proposed Intervention**

The second factor mentioned by the Tenth Circuit in *Utah Ass’n of Counties* concerns prejudice. The Court explained: “The prejudice prong of the timeliness inquiry ‘measures prejudice caused by the intervenors’ delay — not by the intervention itself.’” *Utah Ass’n of*

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the interests the State was asserting. Yet, it was not until October 31, 2008 — more than three years after the filing of the case and a year and a half after the State filed its response to the Rule 12(c) Standing Motion — that Defendants filed their Rule 19 Motion. *See* DKT #1788. Defendants are thus the ones responsible for this issue arising on the eve of trial.

*Counties*, 255 F.3d at 1251 (internal quotation marks omitted). In addition, courts should balance any prejudice to the existing parties against the importance of the issues involved. *See Elliott Indus.*, 407 F.3d at 1103-04. As noted above, in *Elliott Industries*, the movants sought to intervene to challenge the existence of subject matter jurisdiction over a class of royalty owners, an issue that an existing party previously had contested until it was no longer in that party's interest to do so. An appellee in *Elliott Industries* argued that allowing the intervention would cause "additional delay and expense." In granting the motion to intervene, the Tenth Circuit concluded that "any prejudice to either party resulting from . . . intervention . . . is minimal compared with the importance of addressing the question of subject matter jurisdiction." *Id.* The conclusion results from such an analysis in this case.

**a. The State**

The State will suffer *no* prejudice if the Nation's Motion to Intervene is granted. More specifically, the State is not prejudiced by the timing of the Motion to Intervene. The fact that the State is filing the instant Response in full support of the Nation's intervention in this action is sufficient proof of this proposition. Indeed, the State will be greatly prejudiced if the Motion to Intervene is denied. As part of its July 22 Order, the Court concluded that "with respect to claims for money damages, disposing of the case in the Cherokee Nation's absence may impair or impede the Cherokee Nation's ability to protect its interests." Dkt. #2362 at 15. On this basis, the Court dismissed the State's damages claims in their entirety. However, the State and the Nation should be able to hold Defendants fully accountable for the immense injury they have caused to the waters of the IRW. With the Nation's intervention, the basis for the Court's dismissal of the State's damage claims would disappear, and the State and the Nation could work together toward assuring the restoration of the IRW. If the Court does not allow the Nation to

intervene, the State will be left to pursue less than a full recovery for the natural resources at issue, or be required to conduct a second action or trial in order to get full relief.

**b. Defendants**

Defendants will claim that they will be prejudiced by any delay of the trial date necessitated by the intervention of the Cherokee Nation. However, any such claim of prejudice lacks credibility. First and foremost, on June 30, 2009, *Defendants themselves filed a motion with the Court seeking to continue the trial date*. Dkt. #2296. As part of that motion, Defendants asserted that “[a] *short continuance of the trial date would not prejudice any party.*” *Id.* at 3 (emphasis added). In its recent Motion for Continuance of Trial, the State seeks a 120-day extension of the trial date in part to allow Defendants to conduct any additional discovery with respect to the Cherokee Nation. Dkt. #2573 at 3. Further, any delay of the trial is in large part due to Defendants’ decision to wait three years to file their Rule 19 Motion. Had Defendants filed their Rule 19 Motion earlier, the intervention of the Nation likely would not have disrupted the trial date. In sum, Defendants’ claim of prejudice from any delay of the trial date should not be given credibility by the Court.

Defendants may also attempt to claim prejudice resulting from additional work and/or expense in having to defend against the Nation’s claims. However, any such work and/or expense is irrelevant in the timeliness analysis. In the *Johnson v. City of Tulsa* case, the plaintiffs argued that they would be prejudiced by the Fraternal Order of Police’s (“FOP”) intervention in that case because “an additional party would double the work load and add issues.” Ex. A, *Johnson v. City of Tulsa*, at 12. However, the court in *Johnson v. City of Tulsa* reasoned that “[i]n determining prejudice to the parties, the Court cannot consider Plaintiffs’ arguments that an additional party would double the work load and add issues because those

factors ‘are a function of intervention itself rather than the timing of the motion to intervene.’”

*Id.* at 12-13 (quoting *Utah Ass’n of Counties*, 255 F.3d at 1251). Also, Defendants claimed (albeit improperly) that they would be subject to double or inconsistent recovery if the Nation is **not** allowed to intervene. Therefore, the Court should not consider any argument from Defendants as to increased work load or expense.

Clearly, any prejudice to Defendants resulting from the Nation’s intervention would be minimal at most. Further, any prejudice to Defendants is outweighed by the importance of allowing the Nation to have these claims adjudicated. *Elliott Indus.*, 407 F.3d at 1103-04. As the Nation states in its Motion, unless it is allowed to intervene:

[T]here will not be a complete remedy for the pollution of the IRW in this case. The damages claims will not be addressed by the Court thus there will be no restoration of the natural resources injured by Defendants waste disposal practices, even if the State should prevail on all of its remaining claims.

Dkt. #2564 at 3-4. Indeed, the public’s important interests in restoration of the natural resources of the IRW are implicated by the Cherokee’s claims.

Additionally, allowing the Cherokee Nation to intervene and the resulting restoration of CERCLA and common law damages claims would merely restore the case the parties originally faced (and prepared). The Cherokee Nation will rely almost entirely on evidence already developed by the State. Coupled with the State’s conditional request for a short continuance of the trial date, which echoes Defendants’ own earlier continuance request, no prejudice results to Defendants.

Overall, in light of any slight prejudice that Defendants could claim, the Court should grant the Nation’s Motion to Intervene. *See, e.g., McDonald*, 430 F.2d at 1073 (stating that prejudice to the existing parties “may very well be the *only* significant consideration when the proposed intervenor seeks intervention of right”).

**3. *The Cherokee Nation Will Be Substantially Prejudiced If Intervention Is Denied***

As the Nation states in its Motion to Intervene:

The prejudice to the Nation if not allowed to intervene is substantial. Now that this Court has found that the Nation is an indispensable party for the CERCLA and damages claims asserted by the State there is little chance that the funding will be available to provide the restoration that the IRW needs. Without the Nation as a party and the claims that it can bring, an important resource will continue to diminish in quality and economic value.

Dkt. #2564 at 6.

If not allowed to intervene, the Nation would be faced with bringing separate costly and time-consuming litigation against Defendants raising substantially the same claims. The Court has already determined the Nation to be a required party. Intervention would allow the Cherokee Nation's claims, as well as the State's claims, involving both injunctive and damages issues, to be resolved in a single proceeding. Through this single proceeding approach, the Nation would avoid the substantial costs associated with multiple litigation and it would also alleviate any lingering concerns about double, multiple or inconsistent obligations placed on Defendants. The proposed intervention of the Nation raises the opportunity for the case being resolved "by wholes" — avoiding unnecessary dismissal and refiling. A dismissal and refiling risk a significant delay before the Nation's claims (both CERCLA and common law claims) could be resolved. Such prejudice to the Nation would be avoided entirely if intervention is granted.

**4. *The Existence of Unusual Circumstances Also Warrants the Nation's Intervention***

As a whole, this case is certainly "unusual" by just about any measure. In particular, there are unusual circumstances that support the Nation's intervention. Under the Court's unprecedented ruling with respect to CERCLA trusteeship, neither the Nation nor the State may pursue any NRD claim individually relating to the natural resources at issue as to this watershed

and these Defendants. If the Motion to Intervene is denied and the State proceeds to trial on its remaining non-damage claims in this action, the State and Nation could only bring an NRD claim against Defendants in a subsequent and separate action as co-plaintiffs. Because neither sovereign can be joined against its will, both sovereigns will again need to concurrently waive their sovereignty. Given the complexity of the challenges each of the sovereigns faces every day, such coordination of priorities is often difficult. This potentially provides Defendants with an unwarranted and unjust escape from liability. Denial of the Nation's Motion to Intervene would also mean that massive public resources by both sovereigns and the Court would have to again be devoted to this matter.

The analysis of the Nation was that it was not a required party in this matter and given the importance of the water resources at issue, after Defendants' Rule 19 motion was filed, it attempted to assign to the State its rights to prosecute damage claims against Defendants and now seeks to intervene. These procedural facts alone are highly unusual. The sovereign Cherokee Nation's extraordinary effort to have its claims against Defendants decided in this action should not be overlooked or discounted. These unusual circumstances all provide additional support for the Nation's Motion to Intervene.

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In sum, the Court has already determined, in the Rule 19 context, that the Nation satisfies the identical considerations required in a Rule 24 analysis. Moreover, because the Nation (and the parties) only learned on or after this Court's July 22, 2009 Order (and subsequent August 18, 2009 denial of the State's motion for reconsideration of such order) that the Nation was a required party in this lawsuit in order for the damages claims to be heard, the Nation's Motion to Intervene is timely. Accordingly, where these considerations have been satisfied, Rule 24(a)(2)

provides that “the court *must* permit” intervention. Fed. R. Civ. P. 24(a)(2) (emphasis added).

The Cherokee Nation’s Motion to Intervene should be granted.

### **III. CONCLUSION**

Based on the foregoing, the State respectfully requests that the Court grant the Cherokee Nation’s Motion to Intervene (Dkt. #2564).

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